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Nos. 80-848 and 80-883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PIPER AIRCRAFT COMPANY, *Petitioner,*

v.

GAYNELL REYNO

HARTZELL PROPELLER, INC., *Petitioner,*

v.

GAYNELL REYNO

On Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR PETITIONER PIPER AIRCRAFT COMPANY

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QUESTION PRESENTED

Whether, in an action in federal district court brought by foreign plaintiffs against American defendants, the plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied if the case were litigated in the district court is more favorable to them than the law that would be applied by the courts of their own nation.[1]

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[1] Respondent Gaynell Reyno, who brought this action as personal representative of the Estates of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, was the appellant in the court of appeals below. The appellees were petitioner Piper Aircraft Company and Hartzell Propeller, Inc., the petitioner in No. 80-883. Piper Aircraft Company is a subsidiary of Bangor Punta Corporation; it has no subsidiaries or other affiliates itself.

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BRIEF FOR PETITIONER PIPER AIRCRAFT COMPANY

OPINIONS BELOW

The opinion of the court of appeals is reported at 630 F.2d 149 (3d Cir. 1980). The opinion of the district court is reported at 479 F. Supp. 727 (M.D. Pa. 1979).

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1980. A timely petition for rehearing was denied on August 27, 1980. The judgment was amended by order dated September 15, 1980. The petition for a writ of certiorari was filed on November 25, 1980, and granted on February 23, 1981. This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

STATEMENT

1. This case arises out of the crash of a small chartered aircraft in a mountainous region of Scotland on July 27, 1976. J. A. A66, A95.[2] The pilot and all five passengers were killed in the crash. J. A. A66, A70. The passengers all were Scottish citizens and residents, as are their heirs and next of kin. J. A. A67-A68.

The aircraft, a Piper Aztec, was registered in Great Britain and owned and maintained by Air Navigation and Trading Co., Ltd., a Scottish concern. J. A. A69, A70, A74. "The plane was owned, operated, maintained and serviced by the Scottish owner for several years preceding the accident . . ." J. A. A69. At the time of the accident, the aircraft had been leased to and was being operated by another Scottish company, McDonald Aviation, Ltd. *Id.*

The pilot of the aircraft, also a Scottish citizen and resident, was 22 years of age and had obtained his commercial pilot's license less than three months earlier. J. A. A69, A115. He had never flown the aircraft before. J. A. A113. Immediately before the crash, the aircraft was flying over high ground at considerably less than the minimum flight altitude required by the applicable operations manual. J. A. A113-A114. The aircraft developed a spin and crashed, even though "an experienced pilot would have been able to arrest any spin which developed . . ." J. A. A115. "[T]here is no doubt that had [the pilot] been flying higher above the ground there would have been more time available for him to recover from the spin." J. A. A114.

The British Department of Trade Investigation investigated the accident shortly after it occurred. J. A.

[2] "J. A." refers to the Consolidated Joint Appendix.

A69. At the conclusion of this investigation, the appellate board of inquiry determined that although "[a]ll four nuts securing the port propeller governor unit were [found to be] loose [after the accident]," J. A. A99, there was "no mechanical explanation for the aircraft developing a spin, other than possible rough running of the port engine which may have induced the pilot to reduce power . . ." J. A. A116.

2. Respondent Gaynell Reyno instituted this action for damages in July, 1977, in the Superior Court of the State of California, County of Los Angeles. Respondent, who "is a citizen and resident of California and is not related to the decedents," J. A. A69, brought the action as the "personal representative" of the estates of five of the deceased passengers. *Id.* Petitioner Piper Aircraft Company ("Piper"), which had manufactured the aircraft in Pennsylvania in 1968, and Hartzell Propeller, Inc. ("Hartzell"), which had designed and manufactured the aircraft's propellers in Ohio,[3] were named as defendants. *See* J. A. A23, A38, A69.[4] Respondent asserted both strict product liability and negligence as grounds for recovering damages. J. A. A66.

The action was immediately removed to the United States District Court for the Central District of California pursuant to 28 U.S.C. §1441. J. A. A68. Hartzell thereupon moved to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the action. J. A. A2-A3. Piper also move to transfer. J. A. A4. The district court, on December 21, 1977, found that it lacked jurisdiction over Hartzell and transferred the action in

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[3] Hartzell is the petitioner in No. 80-883, which has been consolidated with this case.

[4] The action subsequently was dismissed as to a third defendant, Avco Lyoming Engine Group. *See* J. A. A24, A119.

its entirety to the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. §1404(a). J. A. A4-A5.

3. On May 15, 1978, Piper and Hartzell each moved to dismiss the action on the ground, *inter alia*, of *forum non conveniens*. J. A. A6-A12, A13-A20. After extensive briefing and oral argument, the district court dismissed the action on October 19, 1979, subject to the condition "that the Defendants shall waive any statute of limitations defense that they may have in the courts of Scotland and that they submit to the jurisdiction of the courts of Scotland . . ." J. A. A89.

The district court took as its guide the factors relating to private and public interests set forth by this Court in *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501 (1947):

> The factors pertaining to the private interests of the litigants are the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Id.* at 508. The public factors bearing on the question include the administrative difficulties flowing from court congestion, an interest in having local controversies decided at home, the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the Court, and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-509.

J. A. A70-A71. The court proceeded to consider each of these factors.

After noting that an alternative forum in Scotland was open to respondent, J. A. A72, the district court "turn[ed] to the important factor of Plaintiff's choice of forum." *Id.* The court observed that "the Plaintiff is a representative of foreign citizens and residents seeking a forum in the United States because of the more liberal rules concerning products liability law," J. A. A73, and that "the courts have been less solicitous when the plaintiff is not an American citizen or resident and, particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States." *Id.* Accordingly, the court concluded that, in this case, the "plaintiff's choice of forum is entitled to little weight." J. A. A74.

The district court then determined that the factors relating to private interests point to Scotland as the appropriate forum:

> The connections with Scotland are overwhelming, the real parties in interest are citizens of Scotland, the decedents were all citizens of Scotland, the investigation of the accident occurred in Scotland, the aircraft was owned, operated, and maintained by a Scottish company, the pilot was Scottish, the wreckage remains in the possession of the foreign authorities, nearly all witnesses needed for the defense of this suit are located in Scotland, and all witnesses to damages are located in Scotland.

J. A. A74. In particular, the court noted that "witnesses regarding the maintenance of the aircraft are in Great Britain, witnesses concerning the training of the pilot are located there, and witnesses relating to the investigation of the accident are in the British Isles," J. A. A75, and that "[f]amiliarity with the topography around Tulla, Scotland and inspection of the wreckage of the plane

would be aided by a trial in the British Isles where the accident occurred." J. A. A78. Furthermore, the court considered that the facts that "the witnesses and other evidentiary materials that are located in Scotland are beyond the reach of compulsory process of this court," J. A. A77, and that the defendants would not be able to implead potential Scottish third-party defendants, rendered it "unfair to make Piper and Hartzell proceed to trial in this forum." *Id.* In this connection, the court deemed it relevant that representatives of the five decedents represented here by respondent had brought suit against the pilot's estate, McDonald Aviation (the operating company), and Air Navigation and Trading (the owner of the aircraft) in Scotland. *See* J. A. A70. The court reasoned that "it would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant witnesses." J. A. A78.

The district court determined that the factors relating to public interests also "strongly point to dismissal." J. A. A78. First, the court observed that "a trial in this forum would be hopelessly complex and confusing for a jury as different laws will apply to different parties," J. A. A78-A79, because "Pennsylvania law would apply to Defendant Piper and . . . Scottish law would apply to Defendant Hartzell." J. A. A79. Second, the court pointed out that it was "not familiar with the law of Scotland and would have to rely upon experts from that country." J. A. A85. Third, the Court was persuaded of "the unfairness of burdening citizens in this forum with jury duty when this forum has little connection with the controversy." J. A. A86. Fourth, the court was concerned that trial of the case, which "would take weeks," *id.*, would impose "a huge burden on this court in terms of both time and the costs involved." *Id.*

The court further reasoned that "Scotland has a large interest in the outcome of the litigation as [the accident] occurred in its airspace." J. A. A86-A87.

After reviewing the factors identified by this Court in *Gilbert*, the district court considered and rejected respondent's additional argument that dismissal would be unfair because the Scottish law relating to capacity to sue, liability, and damages would be less favorable to recovery:

> That the law of Scotland is not as helpful to the real parties in interest is not a weighty consideration. We must determine which forum is proper because of convenience and the interests of justice and the decision cannot be correctly made if the amount of a plaintiff's likely award is given undue weight. Generally, the cases that have been dismissed on the ground of *forum non conveniens* all involve situations where a party enters a forum with the hope of seeking more liberal rules of recovery. If the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum.

J. A. A87.

4. The court of appeals reversed and remanded the case for trial. The court began with the premise that, contrary to the view of the district court, respondent was entitled to a strong presumption in favor of her choice of an American forum, notwithstanding that all real plaintiff parties in interest are foreign. J. A. A128-A130. The court acknowledged that "[t]he standard of review is one of abuse of discretion," J. A. A131, but stated that "if the trial court has not held the defendants to their proper burden . . . the equivalent of an abuse of discretion has been demonstrated." *Id.* The court did

not further consider whether the district court had abused its discretion. Instead, the court proceeded to analyze the question of *forum non conveniens* as if the motions for dismissal were before it for *de novo* consideration.

Although the court of appeals recognized that the factors relevant to *forum non conveniens* are those spelled out in *Gilbert*, J. A. A131-A132, it largely dismissed the factors relating to private interests. The court disregarded all considerations relating to securing the attendance of witnesses, purportedly because of the absence of any supporting affidavit, J. A. A132-A134, even though Piper in fact had filed such an affidavit in the district court. *See* Pet. App. F, pp. 1f-3f. The court regarded the problems arising from the absence of compulsory process and the inability to implead potential Scottish third-party defendants as "burdensome" but not "unfair." J. A. A135-A137. And the court apparently believed that inspection of the wreckage would be irrelevant to the litigation. J A. A137.

In the view of the court of appeals, one consideration was decisive: the fact that remitting the real plaintiff parties in interest to their Scottish remedies "would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case." J. A. A139. The court refused to countenance any dismissal that would subject the real plaintiff parties in interest to the disadvantages of the substantive law of their home forum:

> . . . a dismissal for forum non conveniens. . . "should not, despite its convenience, result in a change in the applicable law." Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.

J. A. A139-A140 (footnote omitted), *quoting DeMateos* v. *Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

With regard to the factors relating to public interests identified by this Court in *Gilbert*, the court of appeals first held that the necessity of applying foreign law was not even a permissible consideration. J. A. A138-A139. The court then concluded that, in any event, Pennsylvania law would govern the action against Piper, J. A. A144-A151, and "American standards of liability," J. A. A155, would govern the action against Hartzell, J. A. A152-A156. The court brushed aside all other public interest factors with the unelaborated assertion that "Pennsylvania and Ohio are the jurisdictions with the greatest policy interest in this dispute." J. A. A156.

INTRODUCTION AND SUMMARY

"The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507 (1947). As Alexander Bickel acutely observed in an early article,

> The problem of *forum non conveniens* is really an obvious one. It is this: How much freedom is a plaintiff to have in choosing the place where he wishes to bring suit. He once had next to none. In modern times he has been largely freed of rigid venue restrictions, and been given an area of discretion so wide that, in the judgment of many commentators, he is able to abuse it.

Bickel, *The Doctrine of Forum Non Conveniens as Applied In the Federal Courts in Matters of Admiralty*, 35 Cornell L. Q. 12, 14 (1949). The doctrine of *forum non*

conveniens permits a court to protect against such abuse, and to provide for a fairer and more rational allocation of judicial and private resources, by resisting imposition upon its jurisdiction when a careful balancing of factors indicates that "the litigation can more appropriately be conducted in a foreign tribunal." *Canada Malting Co.* v. *Paterson Co.*, 285 U.S. 413, 423 (1932).

As early as 1941, Justice Frankfurter was able to refer to "the familiar doctrine of *forum non conveniens*" as among the "manifestations of a civilized judicial system [that] are firmly imbedded in our law." *Baltimore & Ohio Railroad Co.* v. *Kepner*, 314 U.S. 44, 55-56 (1941) (dissenting opinion). At that time, the doctrine already had an ancient lineage in the state courts, *see* Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 915-16 (1947), and in admiralty cases in federal courts, *see generally* Bickel, *supra*, 35 Cornell L. Q. at 19-41. But it was not until 1947 that this Court, in *Gulf Oil Corp* v. *Gilbert*, *supra*, established comprehensive guidelines for the application of the doctrine.

In *Gilbert*, the Court emphasized that "[t]he doctrine leaves much to discretion of the court to which plaintiff resorts . . ." 330 U.S. at 508. In exercising that discretion, however, a court is to weigh specific factors relating to private and public interests:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. . . .

> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 508-09.

Shortly after this Court decided *Gilbert* and its companion case, *Koster* v. *Lumbermens Mutual Co.*, 330 U.S. 518 (1947), Congress enacted 28 U.S.C. §1404(a), 62 Stat. 937 (1948), providing that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." This statute, which "permit[s] courts to grant transfers upon a lesser showing of inconvenience," *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32 (1955), has displaced the doctrine of *forum non conveniens* when the choice is between two federal courts. *See, e.g., Levin* v. *Mississippi River Corp.*, 289 F. Supp. 353, 362-63 (S.D.N.Y. 1968). "The enactment of §1404(a) has not, however, terminated the federal court's power to dismiss a case on forum non conveniens grounds, especially where no alternative federal forum is available and the more convenient forum is located in a foreign country." Note,

The Convenient Forum Abroad, 20 Stan. L. Rev. 57, n.2 (1967). In such cases, which typically arise out of accidents occurring abroad, the lower federal courts continue to be guided by the standards set forth in *Gilbert. See, e.g., Pain* v. *United Technologies Corp.,* 637 F.2d 775 (D.C. Cir. 1980); *Codex Corp.* v. *Milgo Electronic Corp.,* 553 F.2d 735 (1st Cir.), *cert. denied,* 434 U.S. 860 (1977); *Alcoa Steamship Co., Inc.* v. *M/V Nordic Regent,* 636 F.2d 860 (2d Cir. 1980); *J. F. Pritchard & Co.* v. *Dow Chemical of Canada, Ltd.,* 462 F.2d 998 (8th Cir. 1972); *Paper Operations Consultants Int'l, Ltd.* v. *S.S. Hong Kong Amber,* 513 F.2d 667 (9th Cir. 1975).

The controlling force of *Gilbert* has been recognized in these various cases, and by the courts below, *see* J. A. A70-A71, A131-A132, notwithstanding that this Court has never expressly determined whether, in diversity cases such as this, application of the doctrine of *forum non conveniens* is a matter of federal or local law. The Court avoided deciding this issue in both *Gilbert* and *Koster. See* 330 U.S. at 509; 330 U.S. at 529. *See also Williams* v. *Green Bay & W. R. Co.,* 326 U.S. 549, 558-59 (1946). Lower federal courts frequently deal with this problem, as did the court of appeals below, *see* J. A A128 n.20, by observing that state law does not differ from federal law. In view of the commanding position that *Gilbert* occupies in this area of the law, such observations may well be correct as a general matter. In fact, however, the federal courts rarely purport to engage in full-blown analysis and application of the local law of *forum non conveniens.* Instead, they proceed for all intents and purposes to formulate and apply federal law.

Certainly this is what the court of appeals below was doing when it held that a dismissal for *forum non conveniens* will not be granted when to do so would result in a change in the applicable law. *See* J. A.

A139-A140. We have found no support for that proposition in either Pennsylvania or California law, and the court of appeals did not even attempt to adduce such support. If local law, rather than federal law, is controlling in these cases, the court of appeals simply violated *Erie R. R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), by making up its own rules instead of conscientiously applying state law.

The parties in this litigation all agree, however, that the doctrine of *forum non conveniens*, which is a procedural matter relating to the discretionary exercise of jurisdiction, plainly calls for the application of federal rather than local law in diversity cases. *See* J. A. A127. *See generally* 1A (Pt. 2) *Moore's Federal Practice* ¶ 0.317 [2] at 3232-33 (1981). As this Court noted in *Koster*, "[w]e are concerned here with the autonomous administration of the federal courts in the discharge of their own judicial duties . . . ." 330 U.S. at 520 n.l. It would be anomalous indeed if the "autonomous administration of the federal courts" were to be controlled by state law. By the same token, a state's rules of *forum non conveniens* relate to the administration of the state's courts. Such rules are not "bound up with [state-created] rights and obligations in such a way that [their] application in the federal courts is required." *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525, 535 (1958).

Moreover, although in *Gilbert* and *Koster* this Court formally left open the question whether the applicable doctrine of *forum non conveniens* in diversity cases is federal or local, the Court's opinions make it apparent that the Court was applying federal law. "[I]f the Court had felt compelled to follow state law, the proper procedure would have been to discuss state law first and apply it rather than to discuss the general principle first

and then note parenthetically that state law would lead to the same result." *Lapides* v. *Doner,* 248 F. Supp. 883, 891 (E.D. Mich. 1965). *Cf. Parsons* v. *Chesapeake & Ohio Ry. Co.,* 375 U.S. 71, 73-74 (1963) ("a prior state court dismissal on the ground of *forum non conveniens* can never serve to divest a federal district judge of the discretionary power . . . to rule upon a motion to transfer under §1404(a)"). Consequently, "[v]irtually all the district courts and commentators that have squarely faced the issue have decided to apply federal law." J. A. A127 n.19. *See also, e.g., Founding Church of Scientology* v. *Verlag,* 536 F.2d 429, 434 n.13 (D.C. Cir. 1976); *Szantay* v. *Beech Aircraft Corp.,* 349 F.2d 60, 66 (4th Cir. 1965); *Willis* v. *Weil Pump Co.,* 222 F.2d 261 (2d Cir. 1955).

A

In considering the factors that bear upon application of the doctrine of *forum non conveniens,* little weight need be given to a nonresident alien's choice of an American forum. To be sure, this Court has indicated, in cases involving American plaintiffs, that a plaintiff's "choice of forum should rarely be disturbed," *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. at 508, at least where he "has sued in his home forum," *Koster* v. *Lumbermens Mutual Casualty Co.,* 330 U.S. at 524. But the Court also has taken care to emphasize that "[a]pplication of *forum non conveniens* principles to a suit by a United states citizen . . . brings into force considerations very different from those in suits between foreigners." *Swift & Co.* v. *Compania Caribe,* 339 U.S. 684, 697 (1950). And by definition, a nonresident alien is not suing in his home forum when he brings an action here.

Nonresident aliens neither support the government as taxpayers nor bear the responsibilities of citizenship. Whereas the United States may be considered to have a special obligation to its own citizens and residents, no similar special duty of care is owed to nonresident aliens. The practical and jurisprudential considerations that traditionally have led courts not to remit American plaintiffs to their remedies abroad are largely inapplicable to cases involving foreign plaintiffs. This is especially true where, as here, the foreign plaintiffs can recommence their action in their home forum. There is little need to be concerned that a foreign plaintiff will be treated unfairly or unjustly by the courts of his own home jurisdiction.

All things considered, there appears to be no substantial reason, beyond the need to fix the burden of persuasion, for paying any deference to a nonresident alien's wish to maintain litigation here rather than in his home forum. Once the defendant has shown that the foreign plaintiff's choice of forum will entail real inconvenience and will impose an undue or unnecessary burden on the court, the foreign plaintiff bears the responsibility for establishing that such inconvenience and burden are at least equally counterbalanced by specific reasons of convenience to himself.

B.

In *Canada Malting Co.* v. *Paterson Co.*, 285 U.S. at 419-20, this Court held that differences between the applicable substantive law of the alternative forums are irrelevant to the application of the doctrine of *forum non conveniens*. The principle thus laid down in *Canada Malting* has been uniformly followed by the lower federal courts until this case. In holding that differences

in substantive law bar dismissal for *forum non conveniens*, the court of appeals below not only ignored *Canada Malting* but also improperly displaced the balancing test of *Gilbert* and eliminated the trial court's discretion in applying that test.

The approach taken by the court below would sound the death knell of the doctrine of *forum non conveniens*. If that doctrine were to be transformed into a single-minded patron of the plaintiff's chances for maximum recovery, a foreign plaintiff, in an action such as this arising out of events or transactions abroad, could insulate himself from dismissal merely by bringing suit in a state whose choice-of-law rules called for the application of American rather than foreign law.

The approach taken by the court of appeals just makes no sense, especially where, as here, the real plaintiff parties in interest are nonresident aliens who retain the right and the ability to proceed in and invoke the protection of their home forum. There is nothing unfair about remitting foreign plaintiffs to the remedies afforded by their own legal system. But it is unfair to subject American defendants, as the court of appeals would do, to the double burden not only of an inconvenient forum but also of harsher rules of liability than would apply in the foreign plaintiffs' own home forum where the accident occurred.

The rule articulated by the court of appeals would significantly add to the burdens of the federal judiciary. The task of deciding *forum non conveniens* motions itself would be complicated by the need to "untangle problems in conflict of laws . . . ." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. at 509. Much more significant, however, is that the decision below amounts to an open-door policy toward foreign claimants, the predictable

result of which will be to induce essentially foreign litigation to be brought here rather than abroad. The net effect of the decision below would be to encourage and facilitate the exploitation of the American legal system by nonresident aliens, to the detriment of American citizens and American courts alike.

C.

Aside from the weight to be given to a foreign plaintiff's choice of an American forum, and the significance to be attributed to differences in substantive law, the only legal issue upon which the courts below significantly disagreed was whether American or Scottish law would apply to Hartzell if the case were tried here. Even if the court of appeals were correct that American law would apply, however, that would not justify reversal of the district court's discretionary determination to dismiss for *forum non conveniens.* Indeed, to treat the applicability of American law not as a neutral factor but as a factor virtually barring dismissal, as the court of appeals did, would be to allow consideration of the differences in the substantive law of the alternative forums to come in through the back door. The effect of such treatment would be to favor the non-resident alien who seeks to exploit liberal rules of recovery and avoid the more restrictive rules of his home jurisdiction. It would also be to allow local choice-of-law rules to affect to a substantial degree, if not determine, the outcome of a *forum non conveniens* motion. Thus all the reasons that bar consideration of differences in substantive law also require treatment of the applicability of American law under local choice-of-law rules as a merely neutral factor in evaluating a motion to dismiss for *forum non conveniens.*

In view of the otherwise lopsided balance of considerations in favor of dismissal for *forum non conveniens*, and the plaintiff's failure to make any showing of counter-balancing reasons of convenience, the district court's exercise of discretion should have been sustained. The plaintiff was not entitled to reversal merely because she prefers the American substantive law that would be applied if the case were tried here.

ARGUMENT

In An Action In Federal District Court Brought By Foreign Plaintiffs Against American Defendants, The Plaintiffs May Not Defeat A Motion To Dismiss On The Ground Of *Forum Non Conveniens* Merely By Showing That The Substantive Law That Would Be Applied If The Case Were Litigated In The District Court Is More Favorable To Them Than The Law That Would Be Applied By The Courts Of Their Own Nation

A. A Nonresident Alien's Choice Of An American Forum Is Entitled To Little Weight

The district court below determined that because the real plaintiff parties in interest were neither American citizens nor American residents, and the suit perforce was not brought in their home forum, their choice of an American forum was entitled to little weight:

> Generally, the courts have been less solicitous when the plaintiff is not an American citizen or resident and, particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States. . . .
>
> Also, the plaintiff's choice of forum is generally given less weight when the forum selected is not the plaintiff's home jurisdiction. . . . Since the real parties in interest are not American citizens, and the forum of either California or the Middle District [of

> Pennsylvania] are not in any way their "home" forum, this factor of plaintiff's choice of forum is entitled to little weight.

J. A. A73-A74. The court of appeals not only rejected this conclusion of the district court, J. A. A129-130, but even treated it as "equivalent of an abuse of discretion . . . ." J. A. A131.

The district court was right to give little weight to the plaintiff's choice of forum in this case. The entire history of the doctrine of *forum non conveniens*, as well as the logic of this Court's decisions giving effect to that doctrine, support the common-sense approach taken by the district court.

The origin of the doctrine of *forum non conveniens*, at least in the federal courts, lies in the power of an admiralty court to decline to exercise its jurisdiction over suits brought by aliens. *See* Braucher, *supra*, 60 Harv. L. Rev. at 920. Throughout much of the long history of its evolution, the doctrine applied solely to such suits. Thus, in reviewing the application of the doctrine in admiralty cases, Professor Braucher concluded in 1947 that "no court seems to have applied the doctrine to dismiss a suit brought by an American citizen in his own right. . ." *Id.* at 921.

In *Gilbert*, this Court held that the doctrine of *forum non conveniens* could be applied to dismiss an action brought by an American citizen. And in *Koster*, dismissal was approved even though the citizen had sued in his state of residence. But in each of those cases, the alternative forum was within the United States. In cases arising out of foreign disputes or transactions, the courts remained reluctant to dismiss an action brought by an

American citizen. As late as 1967, it could still be said that in "no case. . . [has] a bona fide American plaintiff . . . been sent abroad solely on forum non conveniens grounds." Note, *supra*, 20 Stan. L. Rev. at 74.

The historic deference accorded to an American plaintiff's choice of an American forum may now be on the wane. *See Alcoa Steamship Co., Inc.* v. *M/V Nordic Regent,* 636 F.2d at 867-71. But even today there are few instances in which an American Plaintiff's suit against a foreign defendant has been dismissed for *forum non conveniens.* In contrast, the cases are legion in which the suits of nonresident aliens, including suits, such as this, brought be merely nominal American plaintiffs, have been dismissed. *See id.* at 59-67, 68-71.

Citizenship, or at least residence, is likely to bear significantly on the balance of private interests and convenience; it normally is easier for a plaintiff to proceed in his home forum. Citizenship or residence also is relevant to the public interests identified in *Gilbert.* "[A]n American [plaintiff] after all pays taxes toward the support of the Federal courts and is therefore somewhat entitled, where a foreigner has no claim at all, to burden them with a not excessive measure of inconvenience." Bickel, *supra,* 35 Cornell L. Q. at 44-45. In addition, a government may have a special duty to its citizens and residents that transcends mere pocketbook considerations. This Court suggested as much when it held, in *Swift & Co.* v. *Compania Caribe,* 339 U.S. at 697-98 (emphasis added), that "it was improper under the circumstances here shown to remit a *United States citizen* to the courts of a foreign country without assuring the citizen that respondents would appear in those courts and that security would be given equal to what had been obtained by attachment in the District Court."

The courts of this country owe no similar special duty of care to noresident aliens. This Court has treated decisions applying the doctrine of *forum non conveniens* to actions brought by American citizens as largely "inapposite" to cases involving "alien or non-resident parties." *Canada Malting Co.* v. *Paterson Co.*, 285 U.S. at 423. The considerations that traditionally have led courts not to remit American plaintiffs to their remedies abroad do not apply with the same force, if indeed they apply at all, to cases involving foreign plaintiffs. This is especially true where, as here, the foreign plaintiffs retain the right and ability to proceed in their home forum. Concern that the "procedures of the foreign system may not comport with American concepts of procedural or substantive fairness [or that] . . . the foreign legal system may be . . . bias[ed] against foreigners in general, or against Americans in particular," Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. Chi. L. Rev. 373, 384 (1980), is simply out of place when the "foreign system" in question is the plaintiff's own home forum. Whatever may now be considered the appropriate rule with regard to actions brought by American plaintiffs, the virtually unanimous view in the lower federal courts is that a nonresident alien's choice of an American forum is entitled to little weight. *See Pain* v. *United Technologies Corp.*, 637 F.2d at 795-96. *See also* Note, *supra*, 47 U. Chi. L. Rev. at 379.

To be sure, this Court in *Gilbert*, in the context of a suit brought by an American citizen, observed that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." 330 U.S. at 508. But "[a]pplication of *forum non conveniens* priciples to a suit by a United States citizen . . . brings into force considerations very different from

those in suits between foreigners." *Swift & Co.* v. *Compania Caribe*, 339 U.S. at 697. The Court's observation in *Gilbert* itself implies that in some circumstances the plaintiff's choice of forum may be disturbed even though the balance may not be "strongly in favor of the defendant." That may appropriately be the case with respect to actions brought by or on behalf of nonresident aliens. The Court's observation, moreover, must be read together with its more extensive discussion of the question in *Koster*. There, the Court reasoned that some weight, but only limited weight, was due the plaintiff's choice of forum, *when that forum was his home forum*:

> [The plaintiff ordinarily] should not be deprived of the presumed advantages of his home jurisdiction . . . In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.

330 U.S. at 524. Thus, even when the plaintiff proceeds in his home forum, he must make "a real showing of convenience" in order to justify the choice of a forum that is inconvenient to the defendant or burdensome to the court. It follows that a plaintiff who has brought suit elsewhere must make a more compelling justification of his choice of an inconvenient forum. Moreover, since by definition an action brought in an American court by a nonresident alien is never brought in the plaintiff's home forum, dismissal of such an action never deprives the plaintiff "of the presumed advantages of his home jurisdiction." A nonresident alien's choice of an American forum therefore is never entitled to the weight accorded by *Koster* to a citizen's decision to bring suit in his home state.

All things considered, there appears to be no substantial reason, beyond the need to fix the burden of persuasion, for paying any deference to a nonresident alien's wish to maintain litigation here rather than in his home forum. A nonresident alien can fairly be presumed to be at least as familiar with the legal system of his home jurisdiction as with American law. Trial in this country normally will not be more convenient for a foreign plaintiff; and in those rare cases in which it is, that fact can be considered in the balance of private interests. Finally, there is little practical basis or jurisprudential justification for being concerned over the ability or willingness of the foreign plaintiff's home jurisdiction to do justice to his claims.

A nonresident alien's choice of an American forum therefore should be given no independent significance, except insofar as that choice serves to place the burden of persuasion upon the defendant who moves to dismiss. Beyond that, the foreign plaintiff's choice of forum should have no force. Once the defendant has shown that the foreign plaintiff's choice of forum will entail real inconvenience and will impose an undue or unnecessary burden on the court, the foreign plaintiff should bear the responsibility for establishing that such inconvenience and burden are at least equally counterbalanced by specific reasons of convenience to himself.

B. Dismissal Of A Nonresident Alien's Action From An Inconvenient American Forum Is Not Improper Merely Because It May Subject Him To The Less Advantageous Substantive Law Of His Home Forum

"A dismissal on forum non conveniens grounds almost invariably involves a change in the law applicable to the plaintiff's case, although the choice-of-law rules of the second forum may result in the application of the

same substantive law." Note, *Erie, Forum Non Conveniens and Choice of Law in Diversity Cases*, 53 Va. L. Rev. 380, 385 (1967) (footnotes omitted). Thus the law of Scotland, including its choice-of-law rules, would control if this action were recommenced there. The courts below both recognized this fact, but they disagreed as to its relevance.

The district court held that the prospect of a possible change in the applicable substantive law "is not a weighty consideration," J. A. A87:

> We must determine which forum is proper because of convenience and the interests of justice and the decision cannot be correctly made if the amount of a plaintiff's likely award is given undue weight. Generally, the cases that have been dismissed on the ground of *forum non conveniens* all involve situations where a party enters a forum with the hope of seeking more liberal rules of recovery. *If the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum.*

Id. (emphasis added). In contrast, the court of appeals, which assumed, without analyzing Scotland's choice-of-law rules, that "dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case," J. A. A139, held that dismissal for *forum non conveniens* was precluded as a matter of law:

> . . . a dismissal for forum non conveniens . . ."should not, despite its convenience, result in a change in the applicable law." *Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.*

J. A. A139-A140 (emphasis added), *quoting DeMateos* v. *Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 436 U.S. 904 (1978).

The decision of the court of appeals marks a startling departure from the law of *forum non conveniens* established and applied by this Court and the other lower federal courts. In *Canada Malting Co.* v. *Paterson Co., supra*, this Court considered and explicitly rejected the very rule adopted by the court of appeals below. In *Canada Malting*, which arose in admiralty, the libellant, a Canadian corporation, had brought suit here because it preferred American law to that of Canada. 285 U.S. at 418. The district court dismissed for *forum non conveniens*, and the court of appeals affirmed. *Id.* at 417. This Court also affirmed. The Court held that the difference in applicable substantive law, and indeed the entire question of which substantive law would apply, was irrelevant to the doctrine of *forum non conveniens:* "[w]e have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy." *Id.* at 419-20. *See also* Bickel, *supra*, 35 Cornell L. Q. at 37.

The principle laid down in *Canada Malting* was given effect in *Gilbert*. In that case, it was apparent that dismissal for *forum non conveniens* could result in the application of different substantive law by the alternative forum (the plaintiff's home forum). *See* 330 U.S. at 511-12. Yet, in comprehensively discussing the factors to be weighed, and in upholding dismissal, the Court pointedly ignored any possible differences in substantive law. Thus, *Gilbert* confirms that it simply is not pertinent to *forum non conveniens* that the plaintiff's home

forum may apply substantive rules different from those that would govern in the inconvenient forum in which the plaintiff initially chose to bring suit.

Except for the court of appeals below, the lower federal courts have uniformly followed the guidance provided by *Canada Malting* and *Gilbert*. The District of Columbia Circuit has approvingly summarized the case law:

> . . . the comparative amount of recovery obtainable in the two alternative forums has never been considered a factor relevant to the *forum non conveniens* inquiry. In almost every *forum non conveniens* decision the substantive law of one forum potentially favors one litigant over the other. Choice of the applicable substantive law will almost inevitably affect the amount of recovery; thus, an entire body of conflicts-of-law principles has evolved to aid courts making such choices. When a court engages in a *forum non conveniens* analysis, however, its central concern is furthering the just, speedy and inexpensive determination of the action. The *Gilbert* factors are intended to reflect those "*practical* problems that make trial of a case easy, expeditious and inexpensive," not the factors such as choice of governing law which affect the substantive disposition of the case.

Pain v. *United Technologies Corp.*, 637 F.2d at 794-95 (footnotes omitted) (emphasis in original). *See also, e.g., Alcoa Steamship Co.* v. *M/V Nordic Regent*, 636 F.2d at 871-72; *Anastasiadis* v. *S.S. Little John*, 346 F.2d 281, 283 (5th Cir. 1965), *cert. denied*, 384 U.S. 920 (1966). This unanimity of decision has led the commentators, quite rightly, to treat the matter as settled:

> . . . differences in applicable law will not be considered in a decision on a forum non conveniens motion. Thus the usual forum non conveniens

> criteria — such as presence of witnesses, location of documents, and availability of expert witnesses — must be considered by the district court without a weighing of the substantive legal effects that the jurisdictional decision may have on the ultimate recovery . . . [I]f the court does find that a more convenient forum exists abroad, it will not choose to retain the action simply because a foreign court would award smaller damages to the libelant.

Note, *supra*, 20 Stan. L. Rev. at 64-65. *See also* Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 Va. J. Int'l L. 755, 773 (1977).

In nevertheless holding that differences in applicable law not only will be considered but actually will be allowed to control the outcome of a motion to dismiss for *forum non conveniens*, the court of appeals below completely ignored this long and consistent line of contrary authority. In addition, by establishing a rigid rule for disposing of *forum non conveniens* motions, the court below both displaced the balancing test of *Gilbert* and essentially eliminated the trial court's discretion in applying that test. In the view of the court of appeals, the plaintiff's choice of a forum with more favorable substantive law requires that trial be held in that forum, no matter how inconvenient that choice may be to the defendant or how burdensome to the court.

The court of appeals reached its novel result apparently out of a belief that it was required to do so by this Court's decision in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964). *See DeMateos* v. *Texaco, Inc.*, 562 F.2d at 899. The Third Circuit apparently is unique in giving that reading to *Barrack*. This Court in *Barrack* simply

held that, upon a statutory transfer from one federal district court to another under 28 U.S.C. §1404(a), the transferee forum "generally," 376 U.S. at 639, should apply the substantive law of the transferor forum. That decision plainly does not dictate the result reached by the court below.

This Court had noted in *Norwood* v. *Kirkpatrick*, 349 U.S. at 32, that transfers are available under 28 U.S.C. §1404(a) "'whether dismissal under the doctrine of forum non conveniens would have been appropriate or not.'" The question thus presented in *Barrack* was whether, upon the lesser showing of convenience required by 28 U.S.C. §1404(a), "a change of venue within the federal system is to be accompanied by a change in the applicable state law." 376 U.S. at 625. The Court concluded that since the statutory transfer provision was merely "a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts," *id.* at 636, "the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue," *id.* at 639. The Court recognized, however, that this result was different from that which would obtain upon dismissal for *forum non conveniens*, and for that reason the Court specifically left open the question whether the transferee federal court would be required to apply the law of the transferor forum in those cases where it could be contended that a court of the transferor state "would simply have dismissed the action on the ground of *forum non conveniens*." *Id.* at 640.

Nothing in *Barrack* indicated an intention to overrule *Canada Malting* or otherwise work any change in the law of *forum non conveniens*. To the contrary, the Court was concerned solely with the consequences of "a change of venue within the federal system," 376 U.S. at

625, and not with the different considerations that come into play when the more convenient forum is in a foreign country. The law of *forum non conveniens* was left intact.

It should be borne in mind, moreover, that in *Barrack* the Court's attention was directed chiefly to the law to be applied by the transferee forum, not to the factors to be weighed by the transferor forum. The Court's conclusion, that the transferee forum applies the substantive law of the transferor forum, is of course a possible outcome in *forum non conveniens* cases as well. For example, if this litigation were recommenced in Scotland, it would be open to a Scottish court to apply the same substantive rules that would have governed the litigation here. But that would be a matter for the courts of Scotland to decide; their concept of justice, as expressed through their choice-of-law rules, appropriately would govern.

The implication of the decision below appears to be that the choice of substantive law is a matter just too important to be be left to the Scottish courts. But nothing in this Court's decision in *Barrack* suggests that the federal courts may refuse to dismiss for *forum non conveniens* merely out of a parochial concern that the more convenient foreign forum, in implementing its own view of the interests of justice, will choose substantive rules different from those that would apply here. To the contrary, this Court has instructed that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *The Bremen* v. *Zapata Off-Shore Company*, 407 U.S. 1, 9 (1972).

Even if the dictates of authority and prior law could be put aside, there would remain abundant reasons for rejecting the approach taken by the court of appeals in this case. First and foremost, the lower court's holding, if adopted by this Court, would sound the death knell of *forum non conveniens*. The Second Circuit has trenchantly observed:

> A district court has discretion to dismiss an action under the doctrine of *forum non conveniens*, however, even though the law applicable in the alternative forum may be less favorable to the plaintiff's chance of recovery. . . . *A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover.*

Fitzgerald v. *Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976) (emphasis added).

A doctrine of *forum non conveniens* that operated as a single-minded patron of the plaintiff's chances for maximum recovery, and was available only when dismissal would have no effect on the applicable substantive law, would serve little purpose. Under such a doctrine, a foreign plaintiff, in an action arising out of events or transactions abroad, could insulate himself from dismissal merely by selecting a forum whose choice-of-law rules called for the application of American rather than foreign law. *Cf. Dahl* v. *United Technologies Corp.*, 632 F.2d 1027 (3d Cir. 1980) (affirming dismissal for *forum non conveniens* on facts virtually identical to those here, with the difference that the domestic forum, Delaware, would have applied foreign rather than American law). If the doctrine of *forum non conveniens* is to be reduced to a mere by-product of local choice-of-law rules, it might as well be

abolished outright. It will be a rare American defendant who is subject to suit for events or transactions occurring abroad but can be found only in jurisdictions that apply the choice-of-law rule of *lex loci delicti*. *See Gutierrez* v. *Collins*, 583 S.W. 2d 312, 316 (Tex. 1979) ("more than twice as many states have abandoned *lex loci delicti* as have retained it"). And the doctrine of *forum non conveniens* could not in any event perform its important function of rationalizing the allocation of judicial and private resources if it were available only in *lex loci* jurisdictions.

Considered from almost any conceivable perspective, the approach taken by the court of appeals just makes no sense. This is especially true where, as here, the real plaintiff parties in interest are nonresident aliens who retain the right and the ability to proceed in and invoke the protection of their own home forum. We can begin by looking at the matter from the perspective of the private parties. Of course, it goes without saying that the defendants see no reason whatsoever why they should be subjected to the double burden not only of an inconvenient forum but also of harsher rules of liability than would be applicable in the foreign plaintiffs' own home forum, where the accident occurred. But surely, even from the perspective of foreign plaintiffs, there is nothing unfair about remitting them to the remedies afforded by their own legal system. After all, the doctrine of *forum non conveniens* in large part reflects recognition that there is a fitness and propriety in letting the home jurisdiction provide the law for and resolve the claims of its citizens, especially where, as here, the injury actually occurred in that jurisdiction. Moreover, in traveling or otherwise conducting transactions in their own country, the decedents, for whose deaths the plaintiffs seek recovery, presumably relied upon or assumed

the applicability of local law. Certainly they had no legitimate expectation that their affairs would be governed by American law. There is no more justification here than in *Canada Malting* for permitting the plaintiffs to subject the defendants to an inconvenient forum merely in order to take advantage of more favorable American rules of recovery. Indeed, there is even less justification than in *Canada Malting,* for in that case at least the accident had occurred within the United States. *See* 285 U.S. at 417.

The same conclusion follows when the matter is viewed from the perspective of the federal courts and the American judicial system as a whole. The rule articulated by the court of appeals, as is at least partially evident in the court's own opinion, overly complicates the task of deciding *forum non conveniens* motions by enmeshing the court and the parties in a lengthy analysis of the substantive laws and the choice-of-law rules of the competing forums. The doctrine of *forum non conveniens* will become much too unwieldy to serve its purpose of expeditious administration if it is to be encumered in every case by an excursion into the realm of comparative international law. Indeed, as this Court noted in *Gilbert,* one purpose of *forum non conveniens* is to avoid the very need to "untangle problems in conflict of laws." 330 U.S. at 509.

The rule announced by the court below, moreover, amounts to an open-door policy toward foreign claimants that is likely to result in greater burdens upon and congestion in the federal courts. This is not just a matter of requiring the federal courts to retain cases that they otherwise would have dismissed. That in itself is a problem, but it may be only the tip of the iceberg. If foreign claimants become aware that they can bring suit

here without significant risk of dismissal for *forum non conveniens*, the predictable result will be a substantial increase in the amount of litigation brought here rather than abroad. Strict rules of liability, large jury verdicts, contingent fees, and other favorable features of the American legal system would exert an almost irresistable attraction. If *forum non conveniens* were essentially inapplicable, virtually every serious injury anywhere on the globe that arises out of the use of equipment manufactured in the United States — no matter how old the equipment was, and no matter with what skill or by whom the equipment was operated and maintained — could be expected to generate litigation in this nation's courts. An historic purpose of *forum non conveniens* has been to resist such essentially foreign litigation and thereby lessen the burden on American courts that litigation of that kind would impose:

> As early as 1848 a federal court in declining to hear an admiralty suit between British subjects said: ". . . it would be lamentable if courts were compelled to defer the business of the citizens of the country to bestow their time on litigations between parties owing no allegiance to its laws, and contributing in no way to its support."

Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380, 404 (1947). This purpose would be almost completely frustrated by a rule that barred dismissal whenever the foreign plaintiffs can colorably allege that they have a greater prospect of recovery in American courts than in the courts of their own nation.

The rule adopted by the court below certainly makes no sense when viewed from the generalized perspective of our own national interest. At bottom, the court's decision encourages the exploitation of the American

legal system for the benefit of nonresident aliens and to the detriment of American citizens and residents. There is little enough reason why, in our choice-of-law rules, we should subject American citizens to greater duties to foreigners abroad than the foreign state itself imposes. But there is even less reason for further subjecting American citizens to the burden of defending themselves in demonstrably inconvenient forums merely in order to facilitate the foreign claimants' ability to exploit those choice-of-law rules and other advantages they may derive from proceeding in our courts rather than in their home forum. As Justice Holmes aptly observed, "[t]he extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold." *Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473, 479 (1912).

The historic and long-standing practice under the doctrine of *forum non conveniens*, endorsed by this Court in *Canada Malting*, has been to determine the more convenient forum without regard to differences in substantive law. That practice is supported by ample common sense and sound reasons of policy and should be reaffirmed.

C. Reversal Of The District Court's Order Dismissing For Forum Non Conveniens Was Not Warranted By The Mere Fact That In Litigation Here The Plaintiff's Claims Would Be Governed By American Rather Than Scottish Law

"Unlike issues of jurisdiction, determinations of *forum non conveniens* are not pure questions of law; rather they represent exercises of structured discretion by trial judges appraising the practical inconveniences posed to the litigants and to the court should a particular action be litigated in one forum rather than another."

Pain v. *United Technologies Corp.*, 637 F.2d at 781. Appellate review, therefore, is solely to determine whether there has been an abuse of discretion:

> . . . a federal district court has the inherent power to dismiss an action which it deems an imposition upon its jurisdiction so long as an adequate alternative forum is available and so long as the trial judge has carefully "weigh[ed the] relative advantages and obstacles to fair trial" and, taking into consideration the plaintiff's original choice of forum, found the balance of public and private interests to favor dismissal. When appraising a lower court's *forum non conveniens* determination, an appellate court may not substitute its judgment for that of the district court in the absence of a clear abuse of discretion.

Id. at 779 (footnotes omitted). *See also, e.g., Gulf Oil Corp.* v. *Gilbert,* 330 U.S. at 508; *Koster* v. *Lumbermens Mutual Co.*, 330 U.S. at 531; *Alcoa Steamship Co.* v. *M/V Nordic Regent,* 636 F.2d at 871; *Paper Operations Consultants Int'l, Ltd.* v. *S.S. Hong Kong Amber,* 513 F.2d at 670; *Marbury-Pattillo Construction Co.* v. *Bayside Warehouse Co.*, 490 F.2d 155, 158 (5th Cir. 1974).

In this case, it is undisputed that an adequate alternative forum is available in Scotland. It also is clear that the district court carefully weighed the relative advantages and obstacles to fair trial. *See* pp. 4-7, *supra.* The district court's order, therefore, should have been routinely affirmed. The court of appeals nevertheless substituted its own judgment for that of the district court and reversed.

The court of appeals paid lip service to the proper standard of appellate review, but it concluded that the district court, by giving a nonresident alien's choice of

forum little weight, had committed "the equivalent of an abuse of discretion . . . ." J. A. A131. The court then reversed, holding that dismissal for *forum non conveniens* is improper where it would subject nonresident aliens to the less advantageous substantive law of their home forum. As we have seen, the court of appeals was wrong on both counts.

What we are left with, therefore, is the balance of factors already weighed by the district court. And that balance tilts heavily toward dismissal for *forum non conveniens*. The trial judge did not abuse his discretion.

The balance of private interests points overwhelmingly to dismissal. The first of these interests is "the relative ease of access to sources of proof . . . ." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. at 508. The defendants will assert that the cause of the Scottish air crash that gave rise to this litigation was either improper maintenance or improper operation of the aircraft. These defenses depend upon demonstrative, documentary, and testimonial evidence that is available only in Great Britain. All maintenance, flight, and operational records are there, as are the records pertaining to the pilot's training. That is where the employees of the owner and the operator of the aircraft can be found. That is where the government officials reside who investigated the crash, and where the records and reports pertaining to that investigation are located. And because the decedents were all Scottish citizens and residents, and their heirs are too, all evidence relevant to damages, as, for example, the financial loss suffered as a result of the allegedly wrongful deaths, also is in Scotland. All of "these witnesses are critical to this case and since they are located in Scotland, it would be more convenient for the witnesses and less costly for the litigants to litigate

this matter in Scotland." J. A. A75. None of this evidence, moreover, would be available to the defendants through compulsory process in litigation here.

"The inability to implead other parties directly involved in the controversy is a factor which weighs against the retention of jurisdiction . . . ." *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d at 453. Joinder of the owner of the aircraft and its operator, as well as the pilot's estate, is crucial to the presentation of the defense in this case. Yet the defendants cannot, in an American forum, implead these potential Scottish third-party defendants. Especially since those Scottish parties already are involved in litigation in Scotland arising out of the same crash, the district court quite reasonably concluded that "it would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant witnesses." J. A. A78. Even the court of appeals acknowledged that "the defendants' inability to implead other potentially liable parties would indeed make litigation here more burdensome . . . ." J. A. A137. The court questioned, however, whether it would make litigation here "unfair." *Id.* This question was thoroughly considered and correctly answered in *Pain* v. *United Technologies Corp.*, 637 F.2d at 790-91 (emphasis in original):

> We acknowledge that UTC, if found liable in a United States court, would still be able to press a right of indemnification against Helikopter in the courts of Norway. Three considerations convince us that UTC would nevertheless remain prejudiced by suit here. First, UTC would still be severely hampered in the presentation of its defense in *this* case by the inability to join Helikopter as a party. Second, judicial resources would be conserved if all liability were affixed in one suit, and total relief

> granted in one action. . . . Third, foreign courts might place a limit on the amount that UTC could recover against Helikopter in a separate proceeding brought abroad, thus preventing UTC from obtaining full recovery-back of any amount awarded against it in litigation in this country. This consequence would place UTC at a significant disadvantage if the litigation were to be conducted here. Clearly, the inability of the district court to accord full relief suggests that it is inferior to a forum which might possess jurisdiction over *all* significant parties to the dispute.

It is also pertinent to the actual trial of the case that the crash occurred in Scotland:

> It is routine procedure for the judge and jury to view the scene of the accident, often more than once. Jurors drawn from the venue of the accident may be better able to understand testimony pertaining to local conditions and geography.

Lee-Hy Dairy Corp. v. *O'Connor*, 439 U.S. 1034, 1037 (1978) (*denying cert.*, Powell, J., dissenting). The district court quite properly considered these factors and concluded that "[f]amiliarity with the topography around Tulla, Scotland and inspection of the wreckage of the plane would be aided by a trial in the British Isles where the accident occurred." J. A. A78.

These considerations, taken together, militate so strongly in favor of trial in Scotland that dismissal for *forum non conveniens* should be sustained in the absence of a compelling showing that the public interests identified in *Gilbert* require the litigation to go forward here. In this case, no such compelling showing can be made, for those public interests in fact also point toward trial

in Scotland. The factors listed in *Gilbert* themselves make this clear:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

330 U.S. at 508-09. This case originated in the crash in Scotland of an aircraft owned by one Scottish concern, operated by another, and flown by a Scottish pilot; all decedents were Scottish citizens and residents; all real plaintiff parties in interest are Scottish citizens and residents. This localized controversy cries out for a Scottish forum. *See* J. A. A86-A87.

The court of appeals, in its preoccupation with the question of choice of law, apparently lost sight of all these larger considerations. The district court had determined that, in litigation here, the issue of Piper's liability would be determined under Pennsylvania law whereas that of Hartzell's would be governed by Scottish law. *See* J. A. A79. The district court had viewed this as an additional factor favoring dismissal, both because different rules would apply to the two defendants and because the court was unfamiliar with Scottish law. *See* J. A. A79, A85. The court of appeals agreed that Pennsylvania law would apply to Piper but held that Ohio rather than Scottish law would apply to Hartzell. *See* J. A. A155 and n.95. Even if the court of appeals were correct in its choice-of-law analysis, however, reversal of the district court's order was not warranted.

Whether Hartzell would be governed by Ohio or Scottish law, the fact would remain that each defendant would be subject to different standards of liability. As the court of appeals itself noted, "[t]here is some difference between . . . Pennsylvania, on the one hand, and Ohio on the other as to the standard of proof in strict liability." J. A. A155 n.95. Thus some basis remains for the district court's concern that trial would be "complex and confusing for a jury as different laws will apply to different parties." J. A. A79. This, however, is only a minor consideration. The point of major importance is that, whereas the neccessity of applying foreign law affirmatively supports dismissal, the applicability of American law under local choice-of-law rules does not affirmatively support retention of jurisdiction.

To treat the applicability of American rather than foreign law not as a neutral factor but as a factor virtually barring dismissal, as the court of appeals did, is to allow consideration of differences in substantive law to come in through the back door. Once again, a foreign plaintiff who picked an American forum whose choice-of-law rules called for the application of favorable American rules of recovery, rather than of the law of the foreign jurisdiction where the injury occurred, would be effectively insulated from dismissal for *forum non conveniens*. The result would be to favor the nonresident alien who seeks to exploit liberal American rules of recovery and avoid the more restrictive or less generous rules of his own home jurisdiction; it would be to allow local choice-of-law rules to affect to a substantial degree, if not determine, the outcome of the *forum non conveniens* motion; it would be to attract to American courts litigation that really belongs elsewhere. In short, all the reasons that bar consideration of differences in substantive law also require treatment of the applicability of

American law under local choice-of-law rules as a merely neutral factor in evaluating a motion to dismiss for *forum non conveniens*, not as a factor supporting retention of jurisdiction.

In view of the otherwise lopsided balance of considerations in favor of dismissal for *forum non conveniens*, and the plaintiff's failure to make an adequate showing of counter-balancing reasons of convenience, the district court's exercise of discretion should have been sustained. The fact that Ohio rather than Scottish law would apply to Hartzell, if trial were to be held here, did not justify the court of appeals' reversal of the district court's exercise of discretion in dismissing even as to Hartzell. *A fortiori*, it did not warrant reversal of the order dismissing as to Piper. With respect to Piper, the court of appeals left the question of choice of law largely as the district court had found it, with Piper's liability governed by Pennsylvania law. Since Piper made a sufficient showing under the *Gilbert* test to warrant dismissal for *forum non conveniens*, and since the district court made no significant error of law in applying that test to Piper, that court properly exercised its discretion in granting Piper's motion to dismiss.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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